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## CITATIONS

# In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 668

UNITED STATES OF AMERICA, PETITIONER

*v.*

HELEN W. BENEDICT AND FRANK B. SMITH, AS TRUSTEES, AND LELAND E. STOWELL AND UNITED STATES TRUST COMPANY OF NEW YORK AS SUCCESSOR TRUSTEES UNDER THE WILL OF JOHN E. ANDRUS, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled cause on January 3, 1949.

## OPINION BELOW

The opinion of the Court of Claims (R. 7-11) is reported in 81 F. Supp. 717.

## JURISDICTION

The judgment of the Court of Claims was entered on January 3, 1949 (R. 11-12). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1255(1).

## QUESTION PRESENTED

Whether, under Section 162(a) of the Internal Revenue Code, a trust is entitled to measure its maximum allowable deduction for charitable contributions against the total amount of its long-term capital gains despite the fact that only half of those gains are taken into account for income tax purposes under Section 117(b) of the Code.

## STATUTE AND REGULATIONS INVOLVED

The applicable provisions of the statute and Regulations are set forth in the Appendix, *infra*, pp. 8-12.

## STATEMENT

The special findings of fact of the Court of Claims (R. 5-7) may be summarized as follows:

Respondents are trustees under the will of John E. Andrus. This will provided for the creation of a trust which directed the trustees, after paying necessary expenses, to divide the net income into 100 parts, 55 parts to be paid to certain individuals and 45 parts to the Surdna Foundation, Inc., a charitable corporation. Under the terms of the trust, 45% of the corpus upon its termination was to go to the Surdna Foundation and 55% to named individuals. (R. 5-6.) The Surdna Foundation is

a corporation duly organized under the laws of New York exclusively for charitable purposes, payments to which are deductible as contributions under Section 23(o) of the Internal Revenue Code (R. 5). Under the provisions of this trust, 45% of its income for the fiscal year 1944, the period involved in this suit, was permanently set aside for the Surdna Foundation (R. 5).

On the federal income tax return for the trust for the fiscal year ended April 30, 1944, the gross income of the trust, other than gain from capital assets, was shown as $270,169.92. The trust had deductions of $29,602.19, leaving a balance of $240,-567.73, which was the amount currently distributable to beneficiaries. The trust had a gross long-term capital gain of $60,374.01 of which $30,187.01 was taken into account in computing taxable net income. This amount of $30,187.01 was reduced by a 1942 carry-over of $329.60, leaving a balance of $29,857.41. The respondents, on the fiduciary return, deducted $13,435.83, 45% of $29,857.41, which represented Surdna Foundation's portion of such amount. This left the amount of $16,421.58 which was reported on the return as "net taxable gain taxable to trustee." Surdna Foundation actually got 45% of the $60,374.01. (R. 6.)

The respondents filed a timely claim for refund contending that in computing the net income of the trust, 45% of the total capital gains realized, instead of 45% of the amount of $29,857.41, should

have been deducted, and claiming this amount as a deduction. The claim had not been acted on by the Commissioner of Internal Revenue when this suit for refund was commenced. (R. 6-7.)

On the foregoing findings of fact, the Court of Claims, one judge dissenting, held that the respondents were entitled to deduct $27,168.31, being 45% of the total capital gain of $60,374.01, and rendered judgment accordingly in favor of the respondents (R. 7-11).

## REASONS FOR GRANTING THE WRIT

1. The judgment of the Court of Claims is in direct conflict with that of the Court of Appeals for the Second Circuit in *Commissioner* v. *Central Hanover B. & T. Co.*, 163 F. 2d 208, certiorari denied *sub nom. Trust of Andrus* v. *Commissioner*, 332 U. S. 830. That case involved an identical question in connection with an *inter vivos* trust created by John E. Andrus, the decedent herein, which contained substantially the same provisions, including that for distribution of 45% of the net income of the trust to the Surdna Foundation, as does the testamentary trust involved in this case. The Court of Appeals for the Second Circuit held that the *inter vivos* trust could deduct, under Section 162(a) of the Internal Revenue Code (Appendix, *infra*, pp. 11-12), only 45% of the portion of the capital gain, paid to or set aside for Surdna Foundation, which was taken into account in computing net income under Section 117 of the Code

(Appendix, *infra*, pp. 9-11);[1] whereas the Court of Claims in the present case held that the testamentary trust could deduct, under Section 162(a), 45% of the total capital gain paid to or set aside for the benefit of Surdna Foundation, even though only one-half of the gain was taxable income. The two courts agreed that the term "gross income" in Section 162(a), which may be deducted if paid or set aside for charitable purposes, means "gross income" as defined in Section 22(a) of the Code (Appendix, *infra*, p. 8). However, they differed as to whether Section 117(a)(4), which defines a long-term capital gain as the gain from sale or exchange of a capital asset held for more than six months "to the extent such gain is taken into account in computing net income," is a definition of the gain which constitutes gross income under Section 22(a). The Court of Claims expressly recognized that its decision was in conflict with that of the Court of Appeals for the Second Circuit in the *Central Hanover* case, *supra*, in its statement (R.

[1] That case involved the year 1941 and Section 117(b) of the Code then provided that 50%, 66⅔%, and 100%, respectively, of the gain upon sale of capital assets should be taken into account, depending upon whether the capital asset had been held for more than 24 months, between 18 and 24 months, or less than 18 months. This provision was changed by Section 150 of the Revenue Act of 1942, c. 619, 56 Stat. 798, to provide that 50% of the gain should be taken into account if the asset had been held for more than six months and 100% if less than six months. This is the governing provision in the instant case. Section 117(b) of the Internal Revenue Code. However, this change in the law does not affect the question here presented.

11) that it was unable to concur in the *Central Hanover* decision.

2. The question in this case is an important one, which should be settled by this Court. The problem will be a recurring one, since there are numerous trusts which are required to pay or set aside parts or all of their income for charitable purposes, and such trusts will undoubtedly realize at times capital gains from sale or disposition of their assets.[2] For administrative purposes it is essential to have the proper rule declared, particularly in view of the presently existing conflict between this case and *Commissioner* v. *Central Hanover B. & T. Co.*, *supra*. Further, the importance of the question is enhanced by the fact that the opinion of the Court of Claims in effect allows such trusts a double deduction, namely, exclusion from gross income under Section 117(b) of a part (here 50%) of the total gains realized and, second, a deduction under Section 162(a) of the total amount of the gains paid or set aside for charity, one half of which represents the capital gains already excluded from income. We do not believe that such a result was intended by Congress.

[2] The *inter vivos* trust involved in the case of *Commissioner* v. *Central Hanover B. & T. Co.*, *supra*, has already filed a suit in the Court of Claims for the years 1938 and 1939 seeking refund upon the same ground as is involved in the instant case (*Central Hanover Bank and Trust Co.* v. *United States*, C. Cls. Docket No. 48835).

## CONCLUSION

It is, therefore, respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
*Solicitor General.*

APRIL, 1949.

Internal Revenue Code:

SEC. 21. NET INCOME.

(a) *Definition.*—"Net income" means the gross income computed under section 22, less the deductions allowed by section 23.

* * * * *

(26 U.S.C. 1946 ed., Sec. 21.)

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(26 U.S.C. 1946 ed., Sec. 22.)

SEC. 117 [as amended by the Revenue Act of 1942, c. 619, 56 Stat. 798, sec. 150(a), (c)]. CAPITAL GAINS AND LOSSES.

(a) *Definitions.*—As used in this chapter—

* * * * *

(2) *Short-term capital gain.*—The term "short-term capital gain" means gain from the sale or exchange of a capital asset held for not more than 6 months, if and to the extent such gain is taken into account in computing net income;

(3) *Short-term capital loss.*—The term "short-term capital loss" means loss from the sale or exchange of a capital asset held for not more than 6 months, if and to the extent such loss is taken into account in computing net income;

(4) *Long-term capital gain.*—The term "long-term capital gain" means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing net income;

(5) *Long-term capital loss.*—The term "long-term capital loss" means loss from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such loss is taken into account in computing net income;

(6) *Net short-term capital gain.*—The term "net short-term capital gain" means the excess of short-term capital gains for the taxable year over the short-term capital losses for such year;

(7) *Net short-term capital loss.*—The term "net short-term capital loss" means the excess of short-term capital losses for the

taxable year over the short-term capital gains for such year;

(8) *Net long-term capital gain.*—The term "net long-term capital gain" means the excess of long-term capital gains for the taxable year over the long-term capital losses for such year;

(9) *Net long-term capital loss.*—The term "net long-term capital loss" means the excess of long-term capital losses for the taxable year over the long-term capital gains for such year.

* * * * *

(b) *Percentage Taken Into Account.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net capital gain, net capital loss, and net income:

100 per centum if the capital asset has been held for not more than 6 months;

50 per centum if the capital asset has been held for more than 6 months.

* * * * *

(26 U.S.C. 1946 ed., Sec. 117.)

SEC. 161. IMPOSITION OF TAX.

(a) *Application of Tax.*—The taxes imposed by this chapter upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

* * * * *

(b) *Computation and Payment.*—The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary, except as provided in section 166 (relating to revocable trusts) and section 167 (relating to income for benefit of the grantor).

* * * * *

(26 U.S.C. 1946 ed., Sec. 161.)

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23(o)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23(o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit;

* * * * *

(26 U.S.C. 1946 ed., Sec. 162.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.162-1. *Income of Estates and Trusts.*
—* * *

From the gross income of the estate or trust there are also deductible (either in lieu of, or in addition to, the deductions referred to in the preceding paragraph of this section) the following:

(*a*) Any part of the gross income of the estate or trust for its taxable year which, by the terms of the will or of the instrument creating the trust, is paid or permanently set aside during such year for the charitable, etc., uses or purposes referred to or described in section 162(a). ~~This deduction is in lieu of that authorized by section 23(o) in the case of individual taxpayers.~~

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